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NO. 59457-5-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF TUKWILA,

Petitioner,

vs.

KELLAS WILLIAM GARRETT,

Respondent.

RECEIVED
COURT OF APPEALS
DIVISION ONE
JAN 11 2008

REPLY BRIEF

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I. ARGUMENT

A. The City of Tukwila's Jury Selection Process Conformed to Washington Statutory and Case Law.

King County Superior Court erroneously held that the City of Tukwila's (hereinafter "the City") jury selection process was a material departure from the procedure required by law because it selected jurors from outside the city limits of Tukwila. RCW 2.36.050 states that:

In courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. Jurors for the jury panel may be selected at random from the population of the area served by the court.

The main issue in this appeal is what "from the population of the area served by the court" means. As both parties argue, the Washington Supreme Court already answered this question in *State v. Twyman*, 143 Wn.2d 115, 17 P.3d 1184 (2001). However, Respondent only uses select portions of the *Twyman* opinion to assert that the City's jury selection process materially departed from the jury selection procedure required by law.

Respondent asserts that *Twyman* mandates that the City of Tukwila must draw its jurors only from within the city limits of Tukwila. He relies upon one sentence from the opinion without putting it in context. See Respondent's Brief, at 5. In *Twyman*, petitioners argued that jurors must

be drawn from the entire King County population. *Twyman*, 143 Wn.2d at 120. The Supreme Court agreed with petitioners that the King County District Court was considered a single unit; however, within that unit there were individual courts delineated by specific electoral districts. *Id.* at 120-21. The *Twyman* Court further stated that the specific electoral district was the “population of the area served by the court.” *Id.* at 121. Respondent uses this one sentence as the basis for his claim that the City could *only* summons jurors who lived within the city limits of Tukwila.

Not surprisingly, Respondent ignores the next paragraph of the opinion where the *Twyman* Court held that drawing jurors from outside the boundaries of the Shoreline District Court was not a gross departure from the jury selection process. In *Twyman*, the jurors were selected from three zip codes that closely paralleled the electoral district. The Court held that it “was a fair approximation of the Shoreline Division electoral district” even though it included jurors from outside the Division and excluded jurors from inside the Division. *Id.* Similarly, the City selected jurors from three zip codes that roughly paralleled the City’s boundaries, including jurors from outside the City and excluding jurors from inside the City. Following *Twyman*, this juror population satisfied RCW 2.36.050, such that no material departure from the jury selection statute occurred in this case. Therefore, the Superior Court abused its discretion in holding

that the City's jury selection process was a material departure from the jury selection procedure required by law and reversing Respondent's conviction.

The main emphasis in *Twyman* was whether the jury selection process used provided petitioners a fair and impartial jury panel. *Id.* at 122-26. The *Twyman* Court stated "if that end has been attained and the litigant has had the benefit of such a jury it ought not to be held that the whole proceeding must be annulled because of some slight irregularity." *Id.* at 122, quoting *State v. Finlayson*, 69 Wn.2d 155, 157, 417 P.2d 624 (1966). Likewise, this Court must look to whether Respondent had the benefit of a fair and impartial jury panel. It is telling that Respondent does not provide this Court with any evidence that he suffered prejudice as a result of the City's jury selection process. Under the holding in *Twyman*, once the City established its jury selection process did not materially depart from the jury selection statute, the burden shifted to Respondent to show prejudice. *Twyman*, 143 Wn.2d at 122.

Respondent quotes law review articles, the Constitution, and United States Supreme Court cases to emphasize and highlight the importance of the jury selection process. One such article discussed how the purpose of the jury is to act as a check on "the overzealous prosecutor" or "the corrupt judge." See Respondent's Brief, at 15. Respondent does

not provide any evidence that either were present in this case. Indeed, the *Twyman* Court discussed how petitioners listed a whole host of horrors that *could* have happened in the jury selection in their case based upon the jury selection process used. However, none of those horrors occurred in the case. *Twyman*, 143 Wn.2d at 124.

Similarly, Respondent highlights the fact that not a single juror ultimately selected to serve on the jury panel lived in Tukwila. However, he cannot provide any evidence that as a result he suffered prejudice. The fact that the jury found him guilty does not prove any bias or prejudice by the jury selected. Respondent has not provided this Court with actual evidence that any “horrors” occurred in this case, or that the jury selected in this case did not render a fair and impartial verdict. Accordingly, Respondent has not established prejudice.

The City agrees that an accused has the right under both the Washington and the United States Constitutions to a fair and impartial jury. The City’s jury selection process satisfied both Constitutions. The Washington Constitution requires that an accused have the right “to a speedy public trial by an impartial jury of the *county* in which the offense is charged to have been committed.” Wash. Const. Art. I, §22. The United States Constitution requires that an accused “shall enjoy the right to a speedy and public trial by an impartial jury of the State and district

wherein the crime shall have been committed.” Sixth Amendment, U.S. Const. There is no question that all of the jurors summoned for this case lived in King County. The question obviously goes back to what is meant by the term “district” which as discussed above the Washington Supreme Court answered in *Twyman* and the Superior Court erroneously did not follow in this case.

The Supreme Court in *State v. Newcomb*, 58 Wash. 414, 420, 418 P. 355 (1910), held that “[t]here is no method provided for in the constitution for summoning jurors, nor does it attempt to define their qualifications. Hence such matters can be safely and properly left to legislative enactment.” The legislature has provided for courts of limited jurisdictions to contract with the superior court for jury selection. See RCW 2.36.050; RCW 2.36.052. In addition, the Washington Supreme Court has held that a jury selection process that “approximated” the boundaries of the prosecuting authority was not a material departure from the jury selection process. See *Twyman*, 143 Wn.2d at 121. The Superior Court committed reversible error in holding that a material departure from the jury selection procedure required by law occurred in this case. This Court should reverse the Superior Court and remand this case to Tukwila Municipal Court for sentencing of Respondent on the underlying charge of Violation of a Temporary Protection Order.

B. The Statute of Frauds Does not Apply to the Agreement Between the City and King County.

Respondent raises the issue of the Statute of Frauds arguing that the City could not orally renew its contract with King County to provide trial court coordination of jury services. The City contends the Statute of Frauds is not applicable to this case. First, RCW 2.36.052 does not require an "enforceable contract" between the parties. Rather, it only requires a mere "agreement" between the judges of the Superior Court and the court of limited jurisdiction.

RCW 2.36.052 states:

Pursuant to an agreement between the judge or judges of each superior court and the judge or judges of each court of limited jurisdiction, jury management activities may be performed by the superior court for any court of judicial district as provided by statute.

Black's Law Dictionary defines an agreement as "[a] mutual understanding between two or more persons about their relative rights and duties regarding past or future performance. . . ." Black's Law Dictionary, Second Pocket Edition (2001). An "agreement" does not have to be a formal or binding contract. Black's Law Dictionary differentiates a "binding agreement" by defining it as "an enforceable contract." *Id.* Further, a "formal agreement" is defined as "[a]n agreement in which the law requires not only the consent of the parties but also a manifestation of

the agreement in some particular form, in default of which the agreement is null." *Id.* If the legislature's intent was to require courts of limited jurisdiction and the superior court to enter into a formal contract under RCW 2.36.052, it would have used language such as "binding agreement" or "formal contract." However, the legislature stated that there must simply be an "agreement." As a result, the oral agreement between the City and King County satisfies RCW 2.36.052 and does not *require* a written contract.

Second, Judge Walden's oral extension of the expired agreement created a new terminable-at-will agreement not subject to the Statute of Frauds. RCW 19.36.010(1) requires an agreement to be in writing if the terms of the agreement are not to be performed within one year. The original agreement between Tukwila Municipal Court and King County was to be performed over an eighteen-month period. Thus, the agreement was in writing in compliance with the Statute of Frauds. However, when the two courts orally agreed to continue the service and payment obligations of the contract without expressly renewing it, they created a terminable-at-will contract for continued services that is not subject to the Statute of Frauds. By referencing the prior contract, the courts merely adopted its terms in the new contract. The terminable nature of the agreement is expressed in the e-mail correspondence between Greg

Wheeler and Bob Boruchowitz. Wheeler's e-mail indicates that there was not a renewal of the contract, because "there might be some change in the cost to [Tukwila Municipal Court]." *See* Respondent's Brief, at A2.

Thus, the agreement between the courts was a mere stopgap agreement that was terminable at any time, e.g., upon renegotiation of a permanent agreement.

Third, even if this Court believes the Statute of Frauds applies to the oral extension of the contract the part performance exception removes it from the requirement that the agreement be in writing. The part performance exception to the Statute of Frauds has two requirements. The first requirement is that the contract must be proven by clear, cogent and convincing evidence. *In re Marriage of Dewberry*, 115 Wn. App. 351, 361, 62 P.3d 525 (2003). The second requirement is that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. *Id.* at 362.

Respondent does not deny that a contract had existed between the City and King County, and he does not deny that the City and King County continued to adhere to the contract after the original written agreement technically expired. Respondent also does not dispute that the parties verbally agreed to continue the Agreement. King County continued to provide and charge Tukwila Municipal Court for trial court

coordination of jury services. In return, Tukwila continued to pay for those services. Accordingly, the acts relied upon, services rendered and payment for those services, unmistakably point to the existence of a continued agreement between the City and King County. The part performance exception is satisfied and, therefore, the Statute of Frauds does not apply.

Respondent argues that the exception of part performance does not apply to the City's oral agreement with King County to continue their contract regarding jury coordination services claiming that the contract was a "personal services" contract. Part performance of a personal service contract does not avoid the mandate of RCW 19.36.010. *See French v. Sabey*, 134, Wn.2d 547, 552, 951 P.2d. 260 (1998). Respondent's reliance upon *Sabey* is misplaced.

The services provided to Tukwila Municipal Court by King County are not "personal services," as commonly defined. Black's Law Dictionary defines "personal service" as follows: "[a]n act done personally by an individual. In this sense, a personal service is an economic service involving either the intellectual or manual personal effort of an individual." Black's Law Dictionary, Second Pocket Edition (2001). Indeed, the statutory definition of employment in Washington: "means personal service of whatever nature, unlimited by the relationship

of master and servant as known to the common law or any other legal relationship, including service in interstate commerce, performance for wages or under any contract calling for the performance of personal services." RCW 50.04.100. It is clear that an individual, not an organization, must perform a personal service. Here, King County is clearly not an individual and, therefore, the partial performance exception to the Statute of Frauds applies.

II. CONCLUSION

The City's jury selection process was not a material departure from the procedure required by law. Garrett has not shown any prejudice as a result of the jury selection process used in this case. He received a fair and impartial jury. In addition, the Statute of Frauds does not apply to the oral extension of the Agreement that was in place between the City and King County to summon jurors. This Court should reverse the Superior Court's ruling and affirm Garrett's conviction.

RESPECTFULLY SUBMITTED this 11th day of January, 2008.

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